

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503
Boston, MA 02108

MICHAEL MARCHIONDA,
Appellant

v.

G1-19-254

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Stephen Delamere, Esq.
Law Offices of Stephen Delamere
839 Washington Street
Stoughton, MA 02072

Appearance for Respondent:

Anthony Rizzo, Esq.
Boston Police Department
Officer of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Hearing Officer:

Cynthia A. Ittleman¹

DECISION

On December 13, 2019, the Appellant, Michael Marchionda (Appellant), acting pursuant to G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission), contesting the decision of the Boston Police Department (BPD) to bypass him for original appointment to the position of police officer. On January 7, 2020, a pre-hearing conference was held at the offices of the Commission in Boston, Massachusetts. A limited hearing with supplemental testimony was

¹ Commissioner Ittleman conducted the hearing in this matter, but she subsequently retired from the Commission prior to finalizing this decision. The case was subsequently re-assigned to Commissioner Bowman who reviewed the entire record, including a written transcript of the hearing; all exhibits; briefs and all other relevant documents.

held at the Commission on February 12, 2020.² The limited hearing with supplemental testimony was digitally recorded and both parties received a copy of the recording.³ For reasons elaborated upon below, the Appellant's current appeal is *allowed*.

FINDINGS OF FACT:

The BPD bypassed the Appellant on two *prior* occasions for the same reasons that he was bypassed in this current appeal. A full hearing of his *first* bypass appeal (G1-17-187) was held on December 12, 2017 at the Commission's offices before Commissioner Ittleman. During the pendency of the Appellant's first bypass appeal, he was bypassed a second time for identical reasons by the BPD, which prompted a second appeal to the Commission. The second bypass appeal, docketed as G1-18-228, was later consolidated with G1-17-187. On August 15, 2019, the Commission denied Mr. Marchionda's first two bypass appeals. In November 2019, three months after the Commission's decision, the BPD bypassed the Appellant again for the same reasons presented to the Commission in the two prior appeals.

Commissioner Ittleman presided over a limited hearing regarding the instant appeal on February 12, 2020 at the Commission's offices. The parties agreed that the hearing of the Appellant's current bypass appeal would involve only: (1) the testimony of the Appellant regarding matters unfolding from December 2017 to the present with any related documents; (2) documents from the BPD— including, without limitation, the application, PCM, driver's history, criminal history, and credit history for the Appellant and the candidates who bypassed him in the current hiring cycle; but (3) no witnesses for the BPD; with post-hearing briefs to be filed by both parties.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

³ Subsequent to the full hearing, the Commission had a written transcript of the full hearing prepared.

The BPD entered 12 exhibits into evidence at the limited hearing, including the Commission's Decision in the Appellant's consolidated, prior bypass appeals. Based on the documents entered into evidence in this appeal, the findings of fact outlined in the Commission's 2019 decision, the supplemental testimony of the Appellant; and, after taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

Background

1. The Appellant has lived at his current Boston address since 2001. He graduated from high school in 2010, attended a Maine preparatory school in 2011-2012, and graduated from a New Hampshire college with a B.A. in Criminal Justice in 2016. (Ex. 1 and 12). He was recently engaged at the time of the 2019 hearing and had a newborn child. (2019 Testimony of Appellant).
2. The Appellant worked in security for a professional sports team in Boston for several years beginning in 2013. He would drive down from the New Hampshire college for games and then drive back after the game. (2017 Testimony of Appellant; Ex. 1 and 12).
3. Working for the professional sports team, the Appellant received training in screening fans, dealing with disorderly fans, looking for suspicious activity, breaking up physical altercations, and interacting with Boston Police. In his security work, the Appellant interacted with Boston Police, for example, when pre-entry screening of ticket holders indicated that a person carried a firearm. The Appellant also has experience writing reports pertaining to incidents of unruly fans and fights. The Appellant and other members of the

team's private security staff received training from the Boston Police Bomb Squad. (2017 Testimony of Appellant; Ex. 12).

4. Since the fall of 2016, the Appellant has also worked as a security officer at a Boston hospital, where he has received training on de-escalating situations. In that capacity, the Appellant carries Narcan to allow him to respond to occasional overdoses at the hospital involving visitors. In addition, he is also required to deal with persons who may have to be restrained. If there are patients who have been involved in violent crimes, the Boston Police will provide information to hospital security so that security personnel can look out for possible repercussions or reprisals. At the hospital, the Appellant writes incidents reports and he is sometimes supervised by security personnel who are former police officers. (2017 Testimony of Appellant; Ex. 12).
5. The Appellant's hospital supervisor reports that the Appellant has volunteered for shifts when they were shorthanded and has mentored newer employees. He added that the Appellant stays calm in stressful situations such as patient restraint calls and enforcing the hospital access control policy and that the Appellant has had a calm and level-headed demeanor when dealing with stressful situations. (Ex. 12).
6. The Appellant worked the 3pm-11pm shift at the hospital as of the date of this bypass hearing. Since the first bypass appeal hearing, he has been trained as a dispatcher for the hospital and works for the bike patrol unit. As a member of the bike patrol unit, he frequently helps persons who are too hurt or ill to actually make it to the doors of the hospital. He encounters these persons as he patrols the entirety of the hospital grounds. He frequently deals with bike thefts and has had occasion to deal with shooting victims. (2019 Testimony of Appellant).

7. Since his first appeal hearing, he has had continued de-escalation training, since he is an unarmed security officer at the hospital and it is imperative that the security officers have the ability to de-escalate hostile situations. (2019 Testimony of Appellant).
8. There is a Boston Police officer detailed at the hospital twenty-four hours a day, seven days a week. The Appellant works to assist the BPD Officer on duty. At the time of the hearing, the Appellant had recently been called into work by his supervisor to help assist with a shooting at the hospital. The initial contact with the shooter involved one of the Appellant's co-workers. The shooter arrived at the hospital and showed the security officer a gun. The security officer tried to talk to the individual and to calm him down before the individual left the scene. Thereafter, when the suspect was confronted by the Boston Police, the shooting occurred and a valet at the hospital was shot. The Appellant worked closely with the Boston Police that day to provide security at the crime scene. (2019 Testimony of Appellant).
9. As a security officer at the hospital, the Appellant continues to deal with persons with mental illness, hostile situations, and provides security to persons in the hospital suffering from gunshot wounds, sometimes because of gang shootings. (2019 Testimony of Appellant).
10. From the fall of 2016 to the spring of 2017, the Appellant was also a Head Hockey Coach in a training program. (Ex. 12).
11. The Appellant has received no discipline from the hospital or the professional sports team. (Resp. Ex. 12 and Testimony of Appellant).
12. The Appellant has excellent professional references and work history. (2017 Testimony of Rivers; Ex. 1 and 12). He also received positive reviews from his neighbors. (Ex. 1 and 12).
13. On or about March 25, 2017, the Appellant took and passed the police officer civil service

exam. A number of candidates ranked lower than the Appellant on Certification 06203 were selected, bypassing the Appellant; actions the Appellant appealed in this case (G1-19-254). (Stipulation).

14. The BPD bypassed the Appellant on November 22, 2019. In its bypass letter, the BPD indicated that it continued to have significant concerns with the Appellant's judgment and his untruthfulness. Within the letter, the BPD, similar to the two prior hiring cycles, detailed three incidents from his past involving the Waltham Police Department, the Merrimack College Police Department, and the Jaffrey, NH Police Department. (Ex. 11).
15. Det. Bryan Rivers conducted the Appellant's 2017 background investigation for the Recruit Investigations Unit (RIU) at the BPD in 2017. (2017 Testimony of Rivers; Ex. 12).
16. When the Appellant applied to the BPD again in 2018, Det. Karyn VanDyke conducted the Appellant's background investigation. (Ex. 12). The 2018 report of Det. VanDyke updated the 2017 investigation report of Det. Rivers but relied entirely on Det. Rivers' 2017 report with respect to the three above-referenced incidents. (Ex. 12).
17. When the Appellant applied to the BPD for the third time, Detective Bryan Rivers conducted the Appellant's background investigation again. Detective Rivers' report focused on the three incidents that were the subject of his two prior bypasses in 2017 and 2018. (Ex. 1 and 12).

2009 Waltham Incident

18. The 2009 Waltham incident occurred when the Appellant was in high school, 10 years before his most recent application to become a Boston Police Officer, which is the subject of this appeal. The incident involved motor vehicle vandalism that occurred during a house party attended by a number of teenagers, including the Appellant. This matter was found by the BPD as a result of an inter-police department name search that showed the Appellant was

interviewed; it was not part of a criminal record. (2017 Testimony of Rivers; Ex. 1, 4, 5, and 12).

19. The Appellant, as well as approximately nine other high schoolers at the party, were interviewed by Waltham Police concerning the vandalism. Initially, the Waltham Police believed that Mr. Marchionda knew who caused the vandalism. The Appellant and other teens at the party made various statements to the police at different times about who vandalized the car. (Ex. 1, 4, 5, and 12).
20. The Appellant knew that a friend of his at the party committed the vandalism and the Appellant tried to coax his friend to come forward, but his friend refused to do so. Thereafter, one of the other teens who had been at the party reported that the Appellant's friend was the person who allegedly vandalized the car and eventually confirmed the identity of this friend to a Waltham Police Officer. Subsequently, the Appellant spoke with the District Attorney's office to provide information regarding events at the party and the suspect. (2017 Testimony of Appellant; Ex. 1, 4, 5, and 12).
21. The Waltham Police Officer wrote in his report that the initial investigating officer reported that Mr. Marchionda had been untruthful. After further investigation by a second Waltham Police Officer and the Appellant's confirmation that he knew the person who allegedly vandalized the car, the second Officer wrote, in part, "[d]uring my phone conversations with Mr. Marchionda, I felt that he was genuinely upset about the incident and being truthful as to his own involvement. I also felt that he was torn between his friends and between assisting the innocent victim in this matter." Det. Rivers reviewed the Waltham police report and spoke to one of the two officers involved in the case and the teen who was eventually identified as the person who allegedly committed the vandalism. (Ex. 1, 4, 5, and 12).

2011 Merrimack College Incident

22. In 2011, when the Appellant was 19 years old and eight years prior to the Appellant's most recent application for Boston Police Officer in 2019, the Appellant attended a preparatory school in Maine. (Ex. 1, 2, 3, 12; 2017 Testimony of Appellant;).
23. One night in October 2011, the Appellant and two friends from the preparatory school went to Merrimack College (Merrimack) in North Andover to visit friends. (2017 Testimony of Appellant; Ex. 1, 2, 3, 12).
24. The Appellant had his father's car at the preparatory school. On the way to Merrimack, the Appellant and his friends obtained beer and brought it with them to Merrimack. One of the Appellant's friends volunteered to be the designated driver on the way back to the preparatory school. (2017 Testimony of Appellant; Ex. 1, 2, 3, and 12).
25. At some time while the Appellant and his friends were visiting Merrimack in the evening, they were in the car in the parking lot when they saw campus police officers. The Appellant's friend who was driving did not want to drive past the officers because there was beer in the car. They parked the car on campus, got out of the car and went to a dorm to visit friends there. (2017 Testimony of Appellant; Ex. 1, 2, 3, and 12).
26. The Merrimack campus police approached the car when they saw the car's parking lights had been left on. The officers saw beer in the vehicle and looked up the Appellant's name on the campus sign-in sheet. The campus police contacted the room the Appellant was visiting to have him come down. Thereafter, the officers saw the Appellant and his friends on campus and approached them. He and his friends ran away. (2017 Testimony of Appellant; Ex. 1, 2, 3, and 12).

27. The campus officers subsequently located the Appellant and his friends. The Appellant was intoxicated. The officers asked the Appellant if the car he had been in was his and if he had been driving it. The Appellant answered that his father had dropped him off at the college in the car. However, the officers noted that the Appellant had the car keys and he had signed into campus security when he and his friends arrived on campus. The officers asked the Appellant about the beer in the car and the Appellant initially denied having any knowledge about the beer. Asked again if there was beer in the car, the Appellant answered ‘yes’. The officers handcuffed and arrested the Appellant as a Minor in Possession of Alcohol. (2017 Testimony of Appellant; Ex. 1, 2, 3, and 12).

28. The officers transported the Appellant to the North Andover Police Department for booking. During this transport, the Appellant stated that his father was a member of the Boston Police Department. While being booked at the North Andover Police Station, the Appellant was repeatedly asked if his father is a Boston Police Officer. A couple of times, the Appellant answered, “[k]ind of” or “[k]ind of, he knows the Commissioner”. When asked if his father is a high-ranking Boston police official, the Appellant answered, “[k]ind of”. (Ex. 1, 2, 3, and 12). The North Andover police researched online and found that the Appellant’s father worked in maintenance for the Boston Police Department. (2017 Testimony of Appellant; Ex. 1, 2, 3, and 12).

29. The Appellant did not have a copy of the Merrimack campus police report prior to filling out his BPD employment application and stated that he did not vividly remember the incident. When the Appellant attempted to retrieve the report, he was unable to do so because the Merrimack campus police would not provide it to him even though he appeared in person to retrieve it as requested by Merrimack College. (2017 Testimony of Appellant; Ex. 12).

30. The Appellant received Pre-Trial Probation for the Minor in Possession of Alcohol charge and the charge was dismissed six (6) months later. (2017 Testimony of Appellant; Ex. 1 and 12).

2014 New Hampshire Incident

31. The Appellant attended a college in New Hampshire in 2013 - 2016, after preparatory school. While at the college, the Appellant was on the varsity Hockey Team. Early in 2014, the Appellant's girlfriend, Ms. M, came to visit him. The Appellant, Ms. M, and another couple went out to dinner at a nearby Pub/Restaurant. At or about this time in 2014, the Appellant was twenty-one years old and it was approximately five years prior to this most recent application to the Boston Police Department. (2017 Testimony of Appellant; Ex. 12).

32. On the way back to the college, the Appellant's vehicle was pulled over by a municipal New Hampshire police officer. The Appellant's girlfriend was the one who was driving because she had had the least number of drinks. (2017 Testimony of Appellant; 2017 Testimony of Ms. M and Mr. G; Ex. 6 and 12).

33. The Appellant asked the Officer why Ms. M was being pulled over. The Officer responded that she had crossed the white line on the road. The passengers denied that Ms. M had done so. (2017 Testimony of Appellant and Mr. G; Ex. 6 and 12).

34. Ms. M was taken out of the car, questioned, and arrested. The Appellant was told by the Officer that his car would be towed because neither he nor the other occupants were able to drive. The Appellant wanted to have someone pick up the car but his request was denied. (2017 Testimony of Appellant and Mr. G; Ex. 12).

35. The Appellant questioned the Officer about the stop and having his car towed and he was upset that Ms. M was being arrested. (2017 Testimony of Mr. G and Appellant; Ex. 12).

36. The Officer's police report states that the Appellant was "verbally combative and belligerent" and that he was placed in handcuffs and transported to the Police Station in protective custody. (Ex. 12). Mr. G and his girlfriend were also handcuffed and transported back to the Police Station and put in protective custody. (2017 Testimony of Mr. G; Ex. 6 and 12).
37. At the Police Station, the Appellant and Mr. G were placed in the same cell and were given their cell phones to call someone to pick them up. When their ride came to pick them up, all of them, including Ms. M, were released. (2017 Testimony of Appellant and Mr. G; Ex. 6 and 12).
38. The report of the stop of Ms. M does not state the motor vehicle violation for which she was pulled over, nor does it indicate that the police officer conducted a field sobriety test or the results of such tests. (Ex. 6 and 12).
39. The Appellant was not charged with any crimes for his alleged behavior during Ms. M's stop. (Ex. 6 and 12; 2017 Testimony of Appellant and Rivers).
40. The charges against Ms. M were reduced to either a marked lanes violation or negligent operation. (Ex. 12; 2017 Testimony of Ms. M).
41. Det. Rivers spoke to the reporting New Hampshire municipal Officer involved in this stop. The Officer did not recall anything beyond what was in the report. (Ex. 12; 2017 Testimony of Rivers).

BPD Roundtable and Interview

42. The BPD conducts a roundtable discussion to review candidates' background investigation results. At the roundtable, the assigned background investigator presents his or her findings and it is determined if a candidate is to be bypassed, moved forward, or if a discretionary

interview is to be held for the candidate to ask about certain information in the candidate's background. (2017 Testimony of Driscoll).

43. At the Appellant's 2017 roundtable, the subject of his first bypass appeal, there were three concerns relating to poor judgment: 1) the Waltham incident where the Appellant was a possible witness and did not immediately provide his friend's name to the police; 2) the Merrimack College arrest for Minor in Possession of Alcohol and providing untruthful statements to police; and 3) the New Hampshire incident where the Appellant was taken into protective custody and was belligerent toward an officer. (Testimony of Driscoll)
44. Det. Rivers was present during the roundtable discussion relating to the Appellant's application. (2017 Testimony of Rivers). For the Appellant's 2018 application, Det. Karyn VanDyke was the investigator and she presented her report to the roundtable. (2017 Testimony of Driscoll; Ex. 12).
45. The members of the 2017 roundtable decided to give the Appellant a discretionary interview regarding the Appellant's 2017 application. (2017 Testimony of Driscoll; Ex. 9).
46. Any concern that the Respondent has about a candidate they are investigating would be raised during the discretionary interview. The reason for raising the issues of concern during the interview is so that the candidate can address such concerns. The persons conducting the discretionary interview would be aware of the issues of concern. (2017 Testimony of Driscoll).
47. Det. Rivers told the Appellant the subjects that he would be questioned about at the 2017 discretionary interview. (2017 Testimony of Rivers; Ex. 12).
48. Lt. McEachern, former head of the RIU, provided a summary of the Appellant's background for the discretionary interview. That summary contained inaccurate information relating to

the Appellant's NH incident. (Ex. 12). Specifically, Lt. McEachern erroneously stated in his report to Dep. Supt. Walcott that the New Hampshire incident involved the Appellant's arrest for purchasing alcohol for a minor when there is no indication that he was arrested and charged with purchasing alcohol for a minor. (2017 Testimony of Rivers; Ex. 9 and 12).

49. During the Appellant's 2017 discretionary interview, he was asked some questions about the Merrimack College incident. The Appellant stated that he was intoxicated at that time. However, the Appellant was not asked about statements that he made during this incident that his father was a Boston Police Officer, that his father had dropped him off at Merrimack College, and that he did not know about the beer in his car. (2017 Testimony of Appellant; Ex. 9 and 12).

50. At the 2017 discretionary interview, the Appellant was also asked some questions about the New Hampshire incident and he acknowledged that he could have used better judgment. He was not asked specifically what he said or did that led the police to handcuff him. (2017 Testimony of Appellant; Ex. 9 and 12).

51. The Appellant was not asked about his statements to Waltham police about the identity of the person who reportedly vandalized a car. (Ex. 9 and 12; 2017 Testimony of Appellant).

52. Ms. Driscoll and Dep. Supt. Walcott made the decision to bypass the Appellant in 2017. (2017 Testimony of Driscoll; Ex. 12). Ms. Driscoll drafted and signed the Appellant's 2017 bypass letter. (2017 Testimony of Driscoll; Ex. 12). Ms. Mary Flaherty, Deputy Director of Human Resources, signed the Appellant's 2018 bypass letter. (Ex. 12).

53. The Appellant has not had any further incidents since the 2017 bypass and no additional reasons for bypass have been provided by the BPD. (2019 Testimony of Appellant; Ex. 1, 11).

54. The Respondent will consider candidates who have been convicted of driving under the influence of alcohol if the conviction is more than ten (10) years old because people can learn from their mistakes after the passage of time and they can overcome their prior mistakes. (2017 Testimony of Driscoll).

Legal Standard

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. *See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259 (2001); *MacHenry v. Civil Serv. Comm’n*, 40 Mass. App. Ct. 632, 635 (1995), *rev. den.*, 423 Mass. 1106 (1996).

Original and promotional appointments of civil service employees are made from a list of candidates, called a “certification”, wherein names are ranked in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G.L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing

on the candidate's present fitness to perform the duties of the position. Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 461, 474-78 (2019); Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm'n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law’”. Brackett v. Civil Service Comm'n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. *See also* Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”).

The governing statute, G.L. c. 31, gives the Commission's de novo review “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303-305, *rev. den.*, 428 Mass. 1102 (1997). The commission “. . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,” then the occasion is appropriate for intervention by the commission.” *Id.* (*emphasis added*). *See also* Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission's jurisdiction to enforce basic merit principles under civil service law).

Law enforcement officers are vested with considerable power and discretion and must be held to a high standard of conduct:

Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will

not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.

Police Comm'r v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, *rev. den.* 398 Mass. 1103 (1986). This Commission generally owes substantial deference to a police department's decision making, particularly when it comes to hiring police officers. Bos. Police Dep't v. Civ. Serv. Comm'n, 483 Mass. 461, 462 (2019) (citing Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. at 304-305).

Analysis

When issuing its last decision to uphold the BPD's prior bypasses of the Appellant, the Commission stated in relevant part that "... perhaps with the passage of time, continued successful employment experience and no further negative interactions with police, the Appellant's chances of being given a conditional offer of employment will improve", a conclusion consistent with other prior Commission decisions which have stated in part: "... In order for an appointing authority to rely on a record of prior misconduct as the grounds for bypassing a candidate, there must be a sufficient nexus between the *prior* misconduct and the candidate's *current* ability to perform the duties of the position to which he seeks appointment." (Kodhimaj v. Department of Correction, 32 MCSR 377 (2019)).

Particularly with the additional passage of time that occurred here, the BPD has failed to show that there is a sufficient nexus between three prior incidents of alleged misconduct, two of which occurred when the Appellant was a *teenager* (age 16 and 19), and his current ability to perform the duties and responsibilities of a Boston police officer. The most glaring example of this is the incident which occurred when the Appellant was 16 years old. As a junior in *high school*, the Appellant was attending a party in which a car was vandalized. Numerous teenagers present apparently gave conflicting accounts of who may be responsible. In the end, according

to a police officer on the scene, the Appellant ultimately identified who was responsible and was described by the police officer as being sincerely torn between implicating a friend and the fact that a person's vehicle had been vandalized.

The second incident as a teenager occurred approximately eight years prior to the Appellant's application to the Boston Police Department. While visiting friends, he was, according to campus police reports, found to be intoxicated and a minor in possession of alcohol, for which he ultimately received pre-trial probation, after which the criminal charges were dismissed. The Appellant, whose father is apparently a longtime maintenance supervisor for the BPD, made the regrettable mistake of referencing his father's employment with the BPD. The record does not, however, sufficiently establish whether the Appellant falsely identified his father as a Boston police officer.

The third and final incident occurred eight years ago when the Appellant was in college and was the passenger in a vehicle being driven by his then-girlfriend. After the girlfriend was pulled over for an alleged marked lane violation and told that the car would be towed, the Appellant purportedly became "belligerent". When contacted years later, the officer who made those observations had no independent recollection of the incident beyond what was in the report and no criminal charges were ever filed against the Appellant or his girlfriend.

Since this most recent "incident", the Appellant has, for several *years*, been employed as a security officer, first for a Boston professional sports team and, most recently, for a large Boston hospital. His current and prior supervisors, along with neighbors and references interviewed by BPD investigators, consistently describe the Appellant, who was recently engaged and became a father, as a mature and dependable person who would be a valuable addition to the Boston Police Department.

In short, the BPD has failed to show that the three incidents examined by its investigators, two of which occurred when the Appellant was a teenager, and one of which arguably showed evidence of a 16-year-old ultimately making a *good* judgement call, are valid reasons for bypassing the Appellant for appointment as a Boston police officer several years later. It is the BPD's burden to establish reasonable justification for a *third* bypass on the same facts by a preponderance of the evidence. BPD v. CSC, *supra*, 483 Mass. at 469. Although this Commission owes significant deference to the department's personnel decisions, especially with regard to hiring police officers, we "nevertheless [are] bound to reverse a bypass decision when the department fails to meet its burden of proof of demonstrating reasonable justification for the bypass by a preponderance of the evidence." Id.

Here, the BPD did not prove that the Appellant ultimately acted dishonestly as a 16-year-old in conjunction with the motor vehicle vandalism incident; rather, the evidence of record shows that he cooperated with the police and the District Attorney's Office and was truthful as to his own involvement. Although the Appellant initially equivocated with college police during the 2011 Merrimack College incident, the BPD failed to prove that he was dishonest subsequently about what transpired that evening. Importantly, unlike the bypassed police candidate in Cambridge v. Civil Serv. Comm'n, *supra*, there is no proof that this Appellant has ever lied in a formal setting. Finally, the BPD failed to prove that the Appellant did anything more than "mouth off" to a New Hampshire police officer as a 21-year-old when his girlfriend was arrested for possibly impaired or careless driving (even though she was not actually tested for drunk driving) and the police ordered the car towed. Viewed in light of the many police bypass cases this Commission has adjudicated over the years, these relatively innocuous incidents, now 8 to 13 years ago, should not be relied upon in perpetuity to disqualify an

otherwise well-suited candidate. After two prior bypasses, repeated reliance on the same stale incidents loses force as “a valid exercise of discretion based on merit or policy considerations.” Cambridge v. Civil Serv. Comm’n, *supra*, 43 Mass. App. Ct. at 304.

Moreover, “in determining whether an appointing authority’s decision to bypass is justified, the [C]ommission’s primary concern is to ensure that the [appointing authority’s] action comports with ‘[b]asic merit principles’ as defined in G.L. c. 31, § 1.” Sherman v. Town of Randolph, 472 Mass. 802, 810 (2015). “Basic merit principles” is defined in section 1 of the civil service laws as, among other things, “recruiting, selecting and advancing of employees on the basis of their *relative* ability, knowledge and skills[.]” G.L. c. 31, § 1 (emphasis supplied). Here the record evidence demonstrates not only that this Appellant has been bypassed multiple times in favor of candidates who scored less well on the civil service entrance examination administered on behalf of the BPD, but numerous *selected* candidates have displayed instances of alcohol abuse, poor judgment, and absence of complete candor in *their* pasts. I conclude on the basis of this record that the BPD’s most recent bypass of the Appellant does not comport with basic merit principles.

For these reasons, the Appellant’s appeal is *allowed* and the Commission, pursuant to Chapter 310 of the Acts of 1993, is ordering the following relief that will afford the Appellant one additional opportunity for consideration for appointment:

1. HRD shall place the name of the Appellant at the top of future certifications issued to the BPD for original appointment as a Boston police officer until the Appellant has been appointed or bypassed.
2. The BPD may not rely exclusively on the reasons cited in the prior bypasses when considering the Appellant’s future application for employment.

3. Once the relief has been granted (i.e. – the Appellant has been appointed or bypassed, with accompanying appeal rights), the BPD shall notify the Commission which, after verification, will notify HRD that the Appellant’s name should no longer appear at the top of certifications issued to the BPD.

Civil Service Commission

/s/ Christopher C. Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Camuso, Stein and Tivnan, Commissioners) on April 7, 2022.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission’s decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission’s order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Stephan Delamere, Esq. (for Appellant)
Anthony Rizzo, Esq. (for Respondent)
Emily Sabo, Esq. (HRD)
Regina Caggiano (HRD)